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Presentation to the Michigan Senate Natural Resources, Environment & Great Lakes

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Thank you Mr. Chairman and members of the Committee. I am Mark Griffin, President of the Michigan Petroleum Association and the Michigan Association of Convenience Stores. Our membership is comprised of petroleum wholesalers and retailers, as well as, many companies that provide products or services to the first two. We represent over 500 companies with over 1,500 retail locations, who employ over 15,000 people that are located in all of Michigan's 83 counties.

Back in March of this year we testified in front of a joint meeting of this Committee and its House counterpart. At that time we described a regulatory environment for the cleanup of leaking underground storage tanks in Michigan that was a "moving target," and we called for a more consistent regulatory process with the Department of Environmental Quality (DEQ) and the creation of an independent dispute resolution process.

I want to thank Senator Casperson and the other bill sponsors in this package for responding to that call with these bills.

As I stated in March, working with the DEQ to clean up contaminated underground storage tank sites should not be a roll of the dice. Michigan small businesses need clear and consistent regulations so that sites can be cleaned up, closed and reused. The ability of gas station owners to do the right thing, take corrective action and clean up or close leaking underground storage tank (LUST) sites is under increasing strain due to the ever-shifting policies of the DEQ which in some cases we feel has overstepped its authority on this matter. The increasingly complex environmental compliance requirements and the inability to close LUST sites are inhibiting job creation and business growth in Michigan.

Often times, businesses have been faced with a flurry of operational memos and other red tape that make it difficult to clean up or close a LUST site. What was considered clean a year ago is no longer considered clean today, creating a moving target regulatory process that makes it difficult to do business in Michigan.

Businesses also have no dispute resolution process to challenge DEQ decisions on LUST sites. We have seen instances in the past where DEQ staff in Lansing often disagrees with DEQ regional field staff about whether sufficient corrective action has been taken. It is not unusual for environmental consultants to fear the loss of their livelihood if they question DEQ decisions as the Department also has

the oversight ability to eliminate their certification if they buck unnecessary, unlawful, or unscientific orders.

The LUST program needs an independent dispute resolution process comprised of technical experts to challenge DEQ decisions that slow or delay closing cleaned up sites. These sites can be economically viable again, yet the way DEQ is handling these sites results in uncertainty for buyers, sellers and lenders. These types of hurdles for Michigan small businesses need to be removed.

Some of the problems addressed by this package of bills include:

*The DEQ has become increasingly risk adverse. The ability of the regulated community to conduct corrective actions and cleanup/close LUST sites has been greatly diminished because DEQ regularly redefines what it considers to be unacceptable risk. As the DEQ increases its risk aversion and its often unrealistic perception of hazards associated with trace amounts of petroleum, the effort and cost to appease the DEQ increases. In general: what was considered clean last year now needs further study if you want closure this year, with no guarantees for next year.

This package of bills solves this by returning to strict interpretation of Part 213 as intended, including uninhibited use of Risk Based Corrective Action methods.

*The DEQ is not following the statute and is circumventing the Risk Based Corrective Action (RBCA) process. The 1995 amendments to Part 213 included a RBCA process which enabled the regulated community to assess and cleanup sites on a site specific basis by eliminating realistic exposure risks to fuel constituents left in the soil and groundwater. Since 2002, an increasingly risk adverse DEQ has found ways to compel owner/operators of LUST sites to conduct corrective action work that is not required by law, and which exceeds work necessary to complete RBCA. Part 215 and the ASTM RBCA process require QCs and CPs to follow RBCA and to select the most cost efficient, technically sound approach to cleanup. Yet the DEQ uses Operational Memoranda to disallow information that can be used in a RBCA evaluation thus undermining the effectiveness of this decision making process. In addition, DEQ has influenced the regulated community by making demands for additional information on DEQ-required reporting forms, and has made audit "requirements" that rely on compliance with Part 215 Rules (and not statutory requirements under Part 213).

This package of bills solves this by holding the DEQ accountable for strict adherence to statues and promulgated rules by establishing metrics and oversight.

*The DEQ uses the QC/CP process to force environmental firms to comply with the DEQ's current policy approach. Part 215 established the Certified Professional (CP) and Qualified Consultant (QC) program whereby only DEQ-approved consultants were allowed to perform corrective action and report to DEQ for LUST sites. Under Part 215 the DEQ is the agency that has oversight of the QCs and CPs and has the authority to sanction these professionals as it sees fit. As such, consultants licensed by the DEQ must comply with any written request of the DEQ, or potentially face revocation and loss of its license to work. This "fox watching the hen house" scenario has lead QCs and CPs to the perception that they must perform corrective action and reporting in a manner required by DEQ directives, whether or not such measures are consistent with Part 213, Part 215 and the RBCA process. This enabling cycle

must be stopped to cause the DEQ to be legally accountable for their actions. We have been told that the DEQ would like to eliminate the QC/CP program. This would conveniently allow the DEQ to implement their personal agenda, free from the checks and balances of a QC/CP who is required to follow the law.

This package of bills solves this problem by insuring the continuation of the cost effective QC/CP program, with its checks and balances and promotes a culture of closure. Ultimately the QC/CP program should be moved away from the DEQ.

*There is no recourse for the regulated community to challenge DEQ decisions. During the corrective action implementation and reporting for a LUST site, the DEQ makes the final decision on any disputed matter. When it is time for the QC to recommend closure, the DEQ convenes a private "Quality Review Team" in the Lansing headquarters, during which the closure request is reviewed; often resulting in rejection and arbitrary requests for more costly investigation. In many instances the DEQ District office staff has already agreed with the QC that sufficient site investigation or corrective actions have been completed and then the QRT Board overrides the district staff. If the owner/operator or QC disagrees with a DEQ decision there is no means for an appeal other than to take civil action against the DEQ. This is particularly frustrating for the regulated community during this era of moving target regulation in which the DEQ is not strictly following the statutes under Part 213. The end result is often a stalemate in which a LUST site which should be closed is left to languish because DEQ lacks the legal justification for further enforcement.

This package of bills creates Create a review board comprised of independent qualified technical experts to whom a person could appeal DEQ decisions regarding policy or interpretation of the statutes.

*Clearly the way the program has been managed is inhibiting business and jobs creation in Michigan. Increasingly complex environmental compliance requirements and the inability to bring LUST sites to closure increase the cost of doing business in Michigan. Real estate ownership transition is more difficult for contaminated properties that are not able to be closed. The constant changes to how the Part 213 cleanup program is approached by DEQ results in uncertainty for sellers, buyer and lenders. Even if a site is closed, there is the fear that the DEQ's moving target policies will result in the closed LUST site being "re-opened".

This package of bills should encourage and/or direct the DEQ bureaucracy to make Michigan more business friendly so that jobs can be retained and created. The regulated community needs a certainty of process that this package provides.

In summary, this package of bills accomplishes the following objectives:

1. They maintain separation of the Part 201 and 213 programs.

2. They reform the audit program.

3. They create an UST Policy Board, modeled after the former MUSTFA Policy Board, with authority to resolve disputes between owners, operators, CPs, QCs and the DEQ related to audits, corrective action, CP/QC certification, information requests and similar issues.

4. They reaffirm adoption of ASTM RBCA corrective action.

5. They maintain causation based liability.

6. They require a more consistent implementation and application of the LUST Program through the promulgation of administrative rules.

7. They require a cost/benefit analysis prior changing or adopting any procedure or criterion.

We look forward to working with the Legislature to gain passage of this important package.